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No. 98-534

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In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Petitioner-police officers violate Respondent Davis's due process rights when, in order to teach him a lesson after arresting him one night, they handcuffed him and drove him against his will while he was still in custody through the city of Flint to an unfamiliar and dark stretch of busy highway where the speed limit was 55 m.p.h., and which was miles from the police station, where they released him although they knew he was so intoxicated that his perception was impaired, he was staggering and he could hardly stand up; and then left him on that dark highway where he was struck by a vehicle and seriously injured?

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OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), and is reproduced in the Appendix to the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1997, and the Petition for Rehearing was denied on June 29, 1998. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1996)

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioners, police officers Patrick Brady and Shawn Murphy, seek review of the Sixth Circuit's affirmance of the district court's denial of summary judgment on qualified immunity grounds. The plaintiff and Respondent, Steverson Davis, filed suit for violations of his civil rights under 42 U.S.C. § 1983. Davis alleged that the defendants violated his substantive due process rights by placing him at risk of harm when they abandoned him while he was in custody in an inebriated condition on an unfamiliar highway. The district court found that the record presented a claim sufficient to defeat summary judgment, including the establishment of a duty not to subject Davis to danger, and that the defendant officers acted with deliberate indifference to the threat of injury to Davis. The Sixth Circuit affirmed, and the defendant officers have filed a petition for a writ of certiorari.

One evening, Davis attempted to enter the Carriage Town Mission in Flint, where he had been living. The

mission staff refused him entry due to his inebriated condition; Davis had consumed a substantial amount of Thunderbird wine and a half-pint of vodka. Davis became violent and broke some of the mission's windows. The mission staff called the police. (Sixth Circuit Opinion ("Opinion"), App. 2a).

In response, officers Murphy and Brady (Petitioners) came to the mission, where they arrested Davis at 6:48 that evening. Petitioners then took Davis to the Flint, Michigan police station. Later, Davis was transferred to the county jail, but that facility was full. The desk sergeant then instructed Officers Murphy and Brady to "release Davis at the county jail if he was not so drunk that he would be a hazard to himself." No permission to transport Davis was requested by the officers, and none was given by their sergeant. Instead of following their instructions, however, the officers handcuffed Davis and placed him back in the squad car. (Opinion, App. 2a-3a).

With Davis handcuffed in the back seat, Petitioners drove through the city of Flint to Bray Road in Genesee Township, which was located outside the city limits of Flint. There, they made Davis get out of the squad car at the entrance to Bluebell Beach. Bray Road is a 55-mile-per-hour speed limit area, with few street lights and no sidewalk. The officers contend that they took Davis to this location and released him there at Davis' request, but Davis denies making such a request. Instead, Davis maintains that the officers brought him to Genesee Township to "teach [him] a lesson." In his account of the situation, the officers threw him out of the car, forced him to the ground, took off his handcuffs while one officer's boots were pressed against face, called him a "smart ass," and

told him to find his own way back into the city. (*Id.* at 3a; Steverson Davis Dep. at 49-56).

Petitioners' position is that Davis was sober when they released him on Bray Road, but the parties stipulated below that Davis' blood alcohol level was still .176 at 10:00 p.m., when he arrived at the hospital after the accident. A toxicologist testified that at the time Davis was released on Bray Road, his blood alcohol would have been between .191 and .206, and that at that level, he would have shown signs of perception impairment, disorientation, confusion, and lack of coordination. (Opinion at 4a). In addition, other witnesses who saw Davis on Bray Road after Petitioners left testified that Davis was staggering, slurring his words, seemed drunk, and could hardly stand up. (*Id.* at 3a).

After Petitioners left, Davis headed for some nearby houses, where he asked one of the residents to call the police. Genesee Township Police Officer Bruce Carlson responded to the call at 9:03 p.m., arriving on the scene at 9:06 p.m., found Davis at 9:10 p.m., and cleared the call at 9:12 p.m. (Ex. 2 to Deposition of Bruce Carlson Dep. Ex. 2.) According to Officer Carlson, he offered to give Davis a ride or to call someone for him, suggesting an ambulance, a taxi, and a friend or relative. Officer Carlson insists that Davis rejected assistance, calling him "just another damn white officer." (Opinion, App. 3a.) In contrast, Davis maintains that he asked Officer Carlson for a ride back to Flint and that Carlson refused. Officer Carlson testified that he did not have sufficient contact during this time to ascertain whether Davis was drunk, their conversation having occurred while Carlson remained in his cruiser, and Davis outside on the passenger side. (*Id.*

at 3a.) Carlson testified that other Flint officers had dropped off people in his jurisdiction in the past. (Carlson Dep. 16, Court of Appeals R. 171.)

Officer Carlson left at 9:12 p.m., and Davis was hit by a car approximately seven minutes later, sustaining serious permanent injuries. One of his legs was amputated, and he is now a semi-quadriplegic. (Opinion, App. 3a.)

REASONS WHY THE PETITION SHOULD BE DENIED

Summary

Petitioners base their Petition for Certiorari on the contention that the decision of the Sixth Circuit in this case conflicts with this Court's holding in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), and with the Seventh Circuit's holding in *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997). Petitioners are wrong on both counts, however, for neither of those cases involved an in-custody prisoner who was moved against his will to a place of danger and deliberately left there as a form of punishment. The circuit court's ruling in this case is in keeping with this Court's jurisprudence, as announced in *Lewis* and cases such as *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), and is consistent with the approach taken in other circuits in cases such as *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), and *Santamorena v. Georgia Military College*, 147 F.3d 1337 (11th Cir. 1998). Moreover, Petitioners misstate the issues in their Questions Presented, and their statement of Reasons for Granting Certiorari is fatally flawed,

because in both instances Petitioners have ignored the facts that support Davis' case. Instead, Petitioners rely exclusively upon their own version of events, although they seek review of an order denying their motion for summary judgment. *Cf.* Fed. R. Civ. P. 56(c).[1] As is explained more fully in the Sixth Circuit Opinion (App. 5a-12a), and in this Brief, when the disputed factual issues are viewed in the light most favorable to Davis, there is no doubt that the courts below correctly ruled against Petitioners' summary judgment motion.

1. The Circuit Court Opinion Does Not Conflict With the Rules of Substantive Due Process Announced in *Lewis* and *DeShaney*.

Petitioners argue that the Sixth Circuit Court of Appeals misapplied *DeShaney* as well as this Court's recent ruling in *Lewis* when it held that the defendant police officers in this case were not entitled to summary judgment on the basis of official immunity. (Pet. 23-26.) However, Petitioners have misconstrued the circuit court's holding in this case and recited their version of the facts as though they were undisputed. Moreover, Petitioners ignore the essential differences between *Lewis* and cases such as this one, where the officers had ample time to deliberate before choosing their course of action, there were no countervailing safety concerns, and the officers' actions moved an unwilling, custodial subject

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[1] Petitioners purport to "reserve the right to argue Question 3" although they specifically do not seek certiorari on this question. (Pet. i.) Pursuant to Supreme Court Rule 14(a) Question 3 is not properly before this Court.

from a place of relative safety to a place of extreme danger. Finally, Petitioners' expressed purpose, that of teaching Davis a lesson, smacks of imposing punishment without benefit of a trial. (*See* Opinion, App. 5a.)

Petitioners argue that *Lewis* adopted a one-size-fits-all approach to the analysis of substantive due process denials. According to Petitioners, unless the court recites the magic phrase, "shocks the conscience," its holding is automatically inconsistent with *Lewis*. (*See* Pet. 13-15.) But *Lewis* did not adopt such an inflexible standard, nor does *Lewis* reject the "deliberate indifference" standard for cases such as this one. (*See* Pet. 14-15.) Instead, this Court said that due process rules are not "subject to mechanical application." 118 S. Ct. at 1718. In situations such as *Lewis* "where unforeseen circumstances demand an instant judgment on the part of an officer who feels the pulls of competing obligations, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test." *Id.* at 1711. In that case, there was no time for deliberation and choosing between alternative courses of action. *Id.* at 1718. Moreover, the suspect the officer was chasing deliberately chose to speed through the streets, flouting police authority to control traffic. The defendant officer had done nothing to cause the situation that placed the plaintiff at risk, beyond refusing to stop the chase. *Id.* at 1711.

Here, unlike the officer in *Lewis*, Petitioners had ample time for reflection and deliberation before they acted, and there were no competing public safety concerns that impelled Petitioners to force Davis out of their patrol car on a dark and unfamiliar highway miles from the police station.

This Court was careful to distinguish the case before it in *Lewis* from situations such as this one:

> As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, *see Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084-1085, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Id. at 1719 (footnote omitted). Accordingly, the "deliberate indifference" standard is the appropriate gauge of due process violations in situations where government officials "apparently acted with full appreciation of . . . the brutality of their acts," *id.* at 1718 (citing *Rochin v. California*, 342 U.S. 165 (1952)), or where the basic medical needs of a prisoner or detainee were not being met, *id.* at 1711, 1719 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983), and *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

No constitutionally mandated duty of care arose in *Lewis*, because the suspect was not in custody. Instead, *Lewis* involved a high-speed chase by an officer who was attempting to apprehend a suspect. Here, however, Petitioners' treatment of Davis occurred in the "markedly different circumstances of normal pretrial custody." *Id.* at 1719. A long line of this Court's decisions illustrates that the court of appeals was correct in finding that the Constitution does impose a duty of care in such circumstances. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or

from its expressions of intent to help him or her, but from the limitation that the State has imposed on the individual's freedom to act on his or her own behalf. *DeShaney*, 489 U.S. at 200. *See also Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (Eighth Amendment requires the State to provide adequate medical care to incarcerated prisoners); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (substantive due process requires the State to provide involuntarily committed mental patients services necessary to ensure their "reasonable safety" from themselves and others.); *City of Revere*, 463 U.S. at 244 (Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police). These cases and their analyses of the responsibilities owed to prisoners and detainees were expressly approved in *Lewis*. 118 S. Ct. at 1718-19.

The line of cases which includes *Estelle*, *Youngberg* and *City of Revere* imposes a constitutional duty on state officials to act in order to protect persons held in custody or detained. A fortiori, the Petitioners were under a duty to refrain from affirmative acts that moved their detainee from a place of relative safety and abandoned him against his will on a dark, unfamiliar and dangerous highway. (*See* Opinion, App. 9a-10a.) Petitioners' suggestion that *Lewis* has somehow changed these well-established precepts of substantive due process does not withstand scrutiny.

Finally, Petitioners badly miss the mark with their assertion that the Sixth Circuit has set the constitutional bar too low in substantive due process cases. (*See* Pet. 17.) Petitioners maintain that the court of appeals applied a

"gross negligence" standard in determining whether they were entitled to summary judgment on their defense of qualified immunity, (*id.*), but Petitioners are simply wrong. Instead, the circuit court properly applied the deliberate indifference standard announced in *DeShaney* and *Estelle* (Opinion, App. 11a-12a), the same cases that this Court discussed with approval in *Lewis* as establishing the standard for the duty owed to persons in police custody where there is ample time for deliberation. *Cf. Lewis*, 118 S. Ct. at 1718. In sum, the court in this case, in harmony with *Lewis*, recognized that the State has a constitutionally mandated duty to persons it has incapacitated, and that an officer will be liable for acts that reflect deliberate indifference toward the plight of the person thus held.

2. Petitioners Rely on Their Version of Events, Ignoring the Requirement on Summary Judgment that All Disputed Issues of Fact Must Be Construed in the Light Most Favorable to the Non-moving Party.

In their Questions Presented and in their argument, Petitioners assert that after arresting Davis, they released him "at another location" because the jail was overcrowded and Davis had said he would destroy more property at the scene where he was arrested. (Pet. i-ii, 3-5, 16-17.) Relying exclusively on their version of events, Petitioners argue that the court of appeals applied the wrong standard in determining that their conduct violated Davis' substantive due process rights. (Pet. 17.) However, Petitioners have ignored the conflict in the evidence regarding these events, for the record supports Davis' complaint that Petitioners took him into custody

and then dropped him off against his will on a dark, busy highway to "teach him a lesson." (*See* Opinion, App. 3a-4a, 7a.) Thus, Petitioners attempt to avoid their obligation, as the party seeking summary judgment, to show the absence of evidence supporting Davis' complaint. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, when the case is analyzed under the well-settled rule that the conflict in evidence must be viewed in the light most favorable to Davis, it is clear that Petitioners' Questions Presented do not fairly state the issues in this case, and that their statement of Reasons for Granting Certiorari is completely undermined. Fed. R. Civ. P. 56(c); *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Petitioners rely exclusively on their own depositions[2] in their attempt to manufacture "conflicting law enforcement objectives" and justify what they did to Davis. (Pet. 3-4, 16.) Ignoring Davis' testimony that Petitioners told him they were going to "teach him a lesson," and the circumstantial evidence against them, Petitioners recite as fact their contention that the real reason for their actions was Davis' threat to cause further harm at the location where he was apprehended, if the officers released him. (*Compare* Pet. 4-5, *with* Opinion, App. 7a.)

For purposes of summary judgment, however, the district court and the court of appeals were obliged to rule on Davis' assertion that Petitioners handcuffed him and drove him far from the jail, where they released him

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[2] In their Statement of Facts, Petitioners cite to the "Deposition of Shawn Davis (hereafter SM)." (Pet. 3.) However, it is evident that "SM" refers to the deposition of Petitioner Shawn Murphy. (*See* Pet. 3-4.)

from custody in order to "teach him a lesson"; the evidence that Davis was patently incapacitated when he was shoved from the police vehicle onto the highway; and the undisputed evidence that Petitioners chose a busy, dark, unfamiliar highway where the speed limit was 55 m.p.h. as the place to release Davis. (*See* Opinion, App. 3a-4a, 7a.) In sum, neither Petitioners' Questions Presented nor the balance of the Petition speaks to the actual issues this case presents. And, as this Brief shows, the court of appeals correctly applied the law to the actual issues and evidence.

3. The Court of Appeals' Ruling Does Not Conflict with the Holdings of Other Circuits.

Petitioners have attempted to construct a conflict between the Sixth Circuit opinion in this case and the Seventh Circuit holding in *Estate of Stevens*. (Pet. 26-28.) However, no such conflict exists, because *Estate of Stevens*, like *Lewis*, involved a plaintiff whose claim was based on a misapprehension of the State's duty toward persons who had not been arrested or otherwise taken into custody. *See Stevens*, 105 F.3d at 1172. Where a plaintiff is in custody, however, the approach of the Seventh Circuit is similar to and consistent with the Sixth Circuit court's opinion in this case. Indeed, in *Armstrong*, the Seventh Circuit recognized that *Lewis* "endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought." 152 F.3d at 576.

The plaintiff in *Armstrong* was held for fifty-seven days in jail after voluntarily turning himself in in

response to a body warrant for unpaid child support. Despite his repeated inquiries about when he would get to court, jail personnel simply held Armstrong because his file had been misplaced. *Id.* at 568-69. Applying the deliberate indifference standard, the Seventh Circuit had no difficulty in holding that Armstrong's substantive due process rights were violated by the officials whose actions (and inactions) kept him incarcerated and without any means of obtaining a judicial hearing for nearly two months, in the face of his repeated protests. *Id.* at 580. The conduct of the defendants in *Armstrong* was not nearly as purposeful or conscience-shocking as that of Petitioners in this case, for there, the guards took no affirmative action to place the plaintiff in harm's way. Rather, they disregarded Armstrong's complaints and relied on their flawed system to provide notice of when Armstrong's court date would come up, exhibiting deliberate indifference which the court easily found conscience-shocking. *Id.* at 582. The analysis in *Armstrong* makes it clear that Petitioners in this case would find no safe haven if they were presenting their arguments to the Seventh Circuit; that court, like the Sixth Circuit, would unquestionably deny their summary judgment appeal.

Other circuits have also followed the approach taken by the Sixth and Seventh Circuits in evaluating the special relationship and concomitant duty established when the State takes an unwilling subject into custody. *See, e.g., Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252 (10th Cir. 1998); *Santamorena*, 147 F.3d 1337.

4. GVR Is Not Called for in this Case.

Evidently aware that this case is not otherwise appropriate for certiorari, Petitioners assert that the case "would benefit substantially from reconsideration in light of *Lewis*." (Pet. 19.) However, a mere "substantial benefit" to a petitioner should not impel this Court to grant certiorari, vacate and remand (GVR), because "GVR power should be exercised sparingly." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 173 (1996). It is true that 28 U.S.C. § 2106 appears on its face to confer on the Court a broad power to GVR: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1996). However, GVR is appropriate only where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167.

Here, neither condition for GVR is met, for as shown above, the Sixth Circuit's decision on the facts before it is consistent with this Court's jurisprudence and with the approach taken by other circuits in similar cases. Moreover, the ultimate outcome of the litigation does not depend on this Court's GVR power at this time; the court of appeals' ruling only remands the case for trial. Petitioners will have ample opportunity to present their version of the case to a jury which will be appropriately

instructed in light of both *Lewis* and *DeShaney*. Any prejudicial errors committed at trial will be subject to correction on appeal.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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